TABLE OF CONTENTS

MOTION TO DISMISS OR AFFIRM 1

BRIEF IN SUPPORT OF MOTION TO DISMISS—

Facts 3

A. The Claim 3

Argument—

I. Aid to Students in Private and Parochial Schools by Lending Them Textbooks Does Not Violate the Fourteenth Amendment 5

II. The Mississippi Statute Does Not Foster Segregated Schools in Purpose or Effect 8

Conclusion 10

Table of Authorities

CASES

Abington School District v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) 5

Board of Education v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) 5, 7

Burton v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) 7

Cochran v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930) 6

Coffey v. *Education Finance Commission*, 275 F. Supp. 854 (S.D. Miss.) 9

Everson v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) 5

Follett v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) 5

Irvis v. *Moose Lodge* #107, 40 L.W. 4715 (No. 70-75, June 12, 1972) 7, 8

Lemon v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) 5, 6

Peterson v. *City of Greenville*, 395 U.S. 298, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963) 7

Poindexter v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (S.D. La., 1967), affirmed, 389 U.S. 571 (1968) 8, 9

Reitman v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967) 9

Shelley v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 7

Walz v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

First Amendment 5

Fourteenth Amendment 5, 7, 10

Section 6656, Mississippi Code of 1942 ..... 4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-77

DELORES NORWOOD, ET AL.,
Plaintiffs-Appellants,

vs.

D. L. HARRISON, ET AL.,
Defendants-Appellees.

APPEAL FROM THE NORTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellees move the Court, under Supreme Court Rule 16, to dismiss the appeal in that it does not present a substantial federal question as to the claim that (1) a 1940 law providing loaned textbooks to all individual students in both public and private schools violates equal protection.

Alternatively, appellees move the Court to affirm the final judgment of the District Court on the ground that it is manifest that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument: (1) Because the claim that textbook loans to individual students in both public and private schools is unconstitutional is obviously without merit and

because its unsoundness is unmistakably clear from the previous decisions of this Court.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court denying all relief be affirmed.

Respectfully moved this 8th day of August, 1972.

A. F. SUMMER
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
First Assistant Attorney General of Mississippi

HEBER LADNER, JR.
Special Assistant Attorney General of Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

A. The Claim.

Delores Norwood and other members of the plaintiffs' class are black public school students of the Tunica County, Mississippi, School District. The defendants, D. L. Harrison, et al., are members of the Mississippi State Textbook Purchasing Board. The plaintiffs, in attendance at the desegregated unitary Tunica County School System, brought suit to enjoin the defendants from providing or permitting the distribution or sale of state owned textbooks to private racially segregated schools and academies. Their standing to sue was alleged to spring from their right to a totally nondiscriminatory school system and their further right to elimination of state support for racially segregated schools, which right had allegedly been frustrated by the creation of a racially segregated Tunica County institute of learning.

The statistical and empirical evidence marshalled by the plaintiffs to show a supposed connection between the growth and health of a private school system in Mississippi and the provision for textbooks cannot obscure the thrust of their complaint. The plaintiffs are enjoying their constitutionally grounded right to a unitary public school system. While the trial produced evidence of a withdrawal from public education in several Mississippi school districts, there was no proof that the statutory promise, existent since 1940, of provision for textbooks wherever a given student attended, was any moving force in the changes which ensued in student population. The three-judge Court found that ninety per cent (90%) of those students previously in public schools remain there.

Section 6656 of the Mississippi Code of 1942, mandates the distribution of free textbooks to Mississippi school children:

> "This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi. The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, and all other schools located in the state which maintain educational standards equivalent to the standards established by the State Department of Education for the state schools."

Children in private schools have access to these books based on only one discretionary factor. The school attended must maintain educational standards equivalent to the standards of the State Department of Education.

The terms of the statute leave no room for interpretation. Since 1940, free textbooks have been provided to the children attending all private schools in each instance where textbook aid has been requested or recommended by representatives of the children or upon recommendation of a third party. Children attending all private and parochial schools located in the State are entitled to free textbooks under the statute if the school they are attending is located in the State and maintains the standards of the State Education Department. It is significant to note that the textbooks are loaned to individual students, even though distribution is handled through the school. The subsidy, if it be a subsidy, is certainly *de minimis*. The annual per pupil expenditure for new or replacement books is a mere six dollars.

Unquestionably, children attending newly formed private schools are enjoying the textbooks. The board, without an alternative, had to provide books to these students. Otherwise, thousands of carefully selected state owned textbooks would have been rendered useless, since they had already been allocated to each child.

ARGUMENT

I.

Aid to Students in Private and Parochial Schools by Lending Them Textbooks Does Not Violate the Fourteenth Amendment.

For the purposes of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause, should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment.[1] Just as a state action may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abington School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

It is likewise certain from *Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) that state aid to religious institutions which offends the First Amendment is direct institutional aid which results in an inter-

1. The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

twined relationship between the government and the religious authority. *Id.* at 757. "Neutral, or nonideological services, facilities or materials" may be provided free of the Establishment clause if they are given in common to all students. In striking down Pennsylvania's aid to defray teachers' salaries in church related schools, the *Kurtzman* Court found that the aid ran afoul of the carefully preserved distinction that aid must flow to the student and not to the church related school per se. *Id.* at 760. Non-student centered financial assistance has likewise been upheld for churches but only in the context where the involvement of the state is not excessive and where there is no continuing call for state surveillance or entanglement. *Walz* v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). While the tax exemption was to benefit the institution directly, it was saved by virtue of its application to all denominations and by the harshness that might be worked by taxing church property.

This Court has unerringly considered whether a given enactment has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Everson*, supra, at 858. The fact that aid may have assisted a given religious institution did not, in the cited cases, deflect this Court from considering the recipient of the aid and not the institutional by-product of that assistance. Specifically, the *Allen* Court reaffirmed *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930), holding that state wide provision for free textbooks to all students was permissible under the Fourteenth Amendment in that the state may further secular education through private schools as a proper public concern.

This Court treated the argument that free school books assist students in attending sectarian and parochial schools

as of no consequence. Even though the textbook aid was certainly of some value to the religious school, this Court acknowledged that line drawing was necessary, and that the aid was not so direct or substantial as to violate the Establishment clause. *Allen,* supra, at 1065. This line drawing function is more sharply delineated in the Fourteenth Amendment cases in which the Court's formulation has been that the state must "insinuate itself into a position of interdependence [with otherwise private persons] . . . so that they must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Surely six dollars ($6.00) per year per pupil expenditure, when all students of every race enjoy that benefit, cannot be said to be unconstitutional state aid. Furthermore, the notion that Section 6656 aids schools is at variance with the facts. No funds are provided to the school because the textbooks are loaned to the students, and ownership of the books remains in the state. These were significant facts in *Allen,* and they are significant facts here.

The Court has lately addressed itself to the degree of state action necessary to bring the Fourteenth Amendment into play. *Irvis* v. *Moose Lodge #107,* 40 L.W. 4715 [No. 70-75, June 12, 1972]. There our position was reaffirmed in the assertion that private discrimination does not offend equal protection merely because "the private entity receives any sort of benefit from the State . . ." *Id.* at 4718. To violate equal protection the state must be commanding a discriminatory result by its machinery. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Peterson* v. *City of Greenville,* 395 U.S. 298, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963). Here, the Mississippi statute providing textbooks is in no such "symbiotic" re-

lationship with private discrimination. *Irvis*, supra, at 4718.

One final factor cuts in favor of affirmance. Should the case be reversed, the District Court must decide which of 107 private schools can receive books. Stated "open door" policies must be looked into. Determinations must be reached as to the quantity of integration necessary to avoid the textbook ban. Further, what standard should be used for the state's Catholic schools which have scant numbers of black students?

II.

The Mississippi Statute Does Not Foster Segregated Schools in Purpose or Effect.

Judge John Minor Wisdom, writing for a three-Judge Court which enjoined Louisiana's tuition grant system, distinguished this case:

> "Any aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish, therefore, state aid from tax benefits, free schoolbooks, and other products of the State's traditional policy of benevolence toward charitable and educational institutions.)" *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833.

This *ipse dixit* from Judge Wisdom seems particularly appropriate since his rationale would void "any state aid" if the purpose and effect were suspect.

The proscription on state aid fostering private discrimination has fallen upon

"aid which is the product of the state's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination . . ." *Coffey* v. *Educational Finance Commission*, 275 F. Supp. 854 (S.D. Miss.).

The state must significantly encourage private discrimination both in purpose and effect. *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct, 1627, 18 L.Ed.2d 830 (1967). The purpose is to be judged by the natural and probable effect of the legislation. *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (S.D. La., 1967), affirmed, 389 U.S. 571 (1968).

Neither in purpose nor effect does the Mississippi Textbook law foster segregated schools. Unlike the tuition grants, it is a "neutral statute" without racial motivation. On the other hand, all the tuition grants were thinly veiled segregation statutes. Tuition grants were direct aid. As stated in *Poindexter*, "The private schools established in Louisiana are direct beneficiaries of the grants in aid; the children or the parents are conduits to the school." *Poindexter*, supra, at 852. Here textbook aid goes directly to the student.

The relationship between the growth of private schools in step with the increased revenue from tuition grants is well documented. Here, no such link is established and cannot be in the face of the unchallenged finding that 90% of the students remain in public schools.

CONCLUSION

State statute's provision for loans of textbooks to all students in both public and private schools does not offend the Equal Protection Clause of the Fourteenth Amendment. Neither does the Mississippi statute foster segregated schools in a way which would invalidate the statute.

Appellees submit that the appeal from the judgment of the District Court denying all relief should be dismissed, or, in the alternative, that the Judgment and Opinion upon which it is based should be affirmed without further briefing and argument.

Respectfully submitted,

A. F. Summer

A. F. SUMMER
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
First Assistant Attorney General of Mississippi

HEBER LADNER, JR.
Special Assistant Attorney General of Mississippi